

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Tuesday, May 11, 2004 8:04 AM
To: Ethics: Rules Revision Commision
Cc: Rules Revision Commision
Subject: Re: [rrc] Revisions to Rule 2-200

Greetings:

I've attached copies of Stan's draft in WP and PDF. I've also attached versions in Word, to which I've added headers and descriptive name footers, as well as paragraph numbers. I've not touched the substance. There should be five files total attached.

Kevin

Lamport, Stanley W. wrote:

Attached is a revised draft of rule 2-200 in clean and redlined versions. I have not yet addressed the law firm definition. The revised draft incorporates the changes the Commission considered at its May 7 meeting. I have taken the liberty of expanding the Discussion. I look forward to your input.

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Rule 2-200. Financial Arrangements Among Lawyers

(A) A member shall not be party to or make an agreement to and shall not divide a fee for legal services with a lawyer who is not in the same law firm as the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Discussion:

[1] A division of a fee under rule 2-200 occurs when an outside lawyer receives a portion of specific fees paid by a client. The criteria to determine whether there is a division of fees is whether (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the member is paid in the matter; (2) the amount paid by the member to the outside lawyer is neither negotiated nor based on fees which have been paid to the member; and (3) the outside lawyer has no expectation of receiving a portion of a fee. If all three criteria are met, there is no division of fees. (*Chambers v. Kay* (2002) 29 Cal.4th 142; State Bar Formal Opn. 1994-138.)

[2] Paragraph (A) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of a contingency fee or other fee paid to the member. Paragraph (A) is also intended to apply to a division of a fee between a member and another lawyer who are working jointly for a client.

[3] Paragraph (A) is intended to require both the member dividing the fee and a member receiving the division to comply with the requirements of the rule. Paragraph (A) is also intended to require members to comply with the requirements of the rule prior to entering into or becoming a party to an agreement to divide fees. In the absence of such an agreement, members are required to comply with the requirements of the rule prior to dividing the fee.

[4] When there is an agreement to divide fees, it is preferable that the disclosure to the client under paragraph (A)(1) occurs before members enter into such an agreement. Failure to do so may be construed as a breach of a member's duty to keep the client reasonably informed of significant developments related to the representation of a client under rule 3-500 and Business and Professions Code section 6068(m). Certain factors that may be of concern to the client cannot be addressed at the conclusion of the engagement. These concerns may include 1) whether the client is actually retaining the best lawyer for the work or whether the member's involvement is based on the member's agreement to divide the fee; 2) whether the member dividing the fee will devote sufficient time to the matter in light of the fact that the member will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the member.

Rule 2-200. Financial Arrangements Among Lawyers

(A) A member shall not **be party to or make an agreement to and shall not** divide a fee for legal services with a lawyer who is not in the same law firm as the member unless:

(1) ~~Prior to or as a condition of entering into the agreement to divide the fee, the~~ **The** client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

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-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]

Sent: Tuesday, May 11, 2004 8:22 AM

To: Lamport, Stanley W.

Cc: Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr; Kevin Mohr; Kevin Mohr

Subject: Re: [rrc] Revisions to Rule 2-200 - Law Firm Definition (Tuft)

Stan:

Here is Mark's most recent version of the "law firm" definition, in WP and Word, with proposed options, which Mark prepared for discussion at the 12/12/03 meeting. I've also attached Jerry's 12/10/2004 e-mail re same.

As near as I can tell, the definition of law firm was not discussed at either the 12/12/03 or 2/20/04 meetings.

Kevin

Lamport, Stanley W. wrote:

Attached is a revised draft of rule 2-200 in clean and redlined versions. I have not yet addressed the law firm definition. The revised draft incorporates the changes the Commission considered at its May 7 meeting. I have taken the liberty of expanding the Discussion. I look forward to your input.

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Re: Rule 1-310 X
12/12/03 Commission Meeting
Open Session Item III.E
Drafter: Mark L. Tuft

Definition of Law Firm

Draft No. 2

Dated: December 1, 2003

"Law Firm" means:

Issue No. 1: One or more than one lawyer practicing together:

Option 1: [ABA Model Rule 1.0(c)]

A lawyer or lawyers in

Option 2: [Rule 1-100(B)(1)(a)]

Two or more lawyers whose activities constitute the practice of law and who share its profits, expenses and liabilities;

Issue No. 2: Private entities authorized to practice law:

Option 1: [ABA Model Rule 1.0(c)]

. . . a law partnership, professional [law] corporation, sole proprietorship or other association [entity] authorized to practice law;

Option 2: [Rule 1-100(B)(1)(b) and (c)(modified)]

. . . a law partnership, professional law corporation, or other association authorized to practice law and which employs more than one lawyer;

Issue No. 3: Corporate and governmental entities:

Option 1: [ABA Model Rule 1.0(c)(modified)]

. . . or lawyers employed in a division, department, office or group within a governmental entity, a corporation or other organization.

Option 2: [Rule 1-100(B)(1)(c) (modified)]

a division, department, office, or group within a governmental, corporation, or other business entity which includes more than one lawyer who performs legal services for the governmental, corporate, or business entity.

Issue No. 4: Privately or publicly funded legal service organizations:

Option 1:

. . . or other private or publicly funded association or entity authorized to practice law;

Option 2:

. . . a legal services organization or a publicly funded entity which includes more than one lawyer who performs legal services.

Drafter's Notes

1. Rather than focus on the ABA versus California rule format, this draft separates the concepts in each of the two formats in the previous draft.
2. Reference is made to the Notes to Draft No. 1 with respect to each of the proposed options.

CalBar – RRC
Rule 1-310X
Definition of “Law Firm”

December 10, 2003 Sapiro E-mail to RRC List:

Regarding the draft definition of "law firm" I would raise the following issues that concern me:

1. In issue 1, option 2 would exclude from the definition of a "law firm" a sole proprietor who employs fifty salaried lawyers, because they would not be sharing profits and expenses, even if they share some liabilities.

2. In issue 2, option 1 the phrase "authorized to practice law" concerns me. If lawyers are improperly practicing in a business form not authorized to practice law, they ought still to be subject to the Rules of Professional Conduct applicable to lawyers in authorized business forms.

3. Issue 2, option 2 concerns me for the same reason as issue 1, option 2. If a sole practitioner employs thirty paralegals, but no lawyers, are we intending to exclude him from coverage of the rules pertaining to lawyers in law firms?

4. Regarding issue 3, option 2, I prefer this formulation to option 1. However, I suggest that the phrase "for the governmental, corporate or business entity" be deleted. A city attorney may represent city employees and not just the entity. A public defender performs legal services for people outside city government.

5. Regarding issue 4, option 1, I express the same concern regarding the phrase "authorized to practice law" as I raise with regard to issue 2, option 1. I prefer issue 4, option 2.